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## THE POWERS OF COURTS OF EQUITY.

### I. "IN REM" AND "IN PERSONAM."

"A decree is not like a judgment in the King's Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right, but only the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison until he will obey, and this is all that the Chancellor can do."<sup>1</sup> "The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*."<sup>2</sup> Over and over again are we confronted with these and similar statements. Judges and text-writers alike not only repeat these statements but give them as reasons for reaching decisions in cases. "Because," they say, "equity acts *in personam* it can do" one thing; "because it acts only *in personam*, it can not do" another thing. An example of the first line of argument is found in the case of *Toller v. Carteret*,<sup>3</sup> in which the foreclosure of an equity of redemption to land in another jurisdiction was asked. To the defendant's objection that the court had no jurisdiction, Lord Cowper, K., said the court of Chancery had jurisdiction since "the defendant was served with process here, *et aequitas agit in personam*, which is an answer to the objection." The decision in the case of *Ewing v. Orr Ewing*,<sup>4</sup> already cited, was based upon the same kind of reasoning. The second line of argument is illustrated by the following passage from the opinion of the Supreme Court of the United States in *Hart v. Sansom*<sup>5</sup>:

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff."

<sup>1</sup>Knightly, Serjeant at law, in Y. B. 27 Hen. VIII, f. 15, pl. 6, quoted in Ames, Cases in Equity Jurisdiction, p. 2. Compare J. R. v. M. P., (1459) Jenk. Cent. Cas. 108, pl. 9: "A decree there binds the person to obedience, but does not at all operate upon the matter in question."

<sup>2</sup>Lord Selborne, in *Ewing v. Orr Ewing* (1883) 9 App. Cas. 34, 40.

<sup>3</sup>(1705) 2 Vern. Ch. 494.

<sup>4</sup>(1883) 9 App. Cas. 34.

<sup>5</sup>(1884) 110 U. S. 151, 154.

The following typical extracts also show the important part played by this "maxim of equity" in the discussion of equity jurisdiction by text writers.

"The fundamental difference between law and equity [is], namely, that the law acts *in rem*, while equity acts *in personam*."<sup>8</sup>

"Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person. . . . Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice."<sup>9</sup>

"Some writers even in theoretical discussion have allowed themselves to speak of the destinator as 'the real owner' and of the trustee's ownership as 'nominal' and 'fictitious.' See Salmond, Jurisprudence, p. 278. But I think it is better and safer to say with a great American teacher that 'Equity could not create rights *in rem* if it would, and would not if it could.' See Langdell, Harvard Law Review, vol. I, p. 60."<sup>10</sup>

"A court of equity, since it proceeds only *in personam*, must have personal jurisdiction."<sup>11</sup>

"This interpretation of *Aequitas agit in personam* materially crippled, and permanently weakened, the judicial power of the chancellor, in that it rendered him unable to act on 'constructive service,' even though the *res* in controversy were within his jurisdiction. He had to have a party actually present before him, physically and intellectually capable of performing the order the chancellor might lay upon him. The chancellor could not say, as the admiralty judge could say: 'The whole world . . . are parties in an admiralty cause: and, therefore, the whole world is bound by the decision.' . . . The most important consequence, for present purposes, of this English judicial rendering of the Latin formula, *Aequitas agit in personam*, was this: Whenever the chancellor created and enforced a new right, *i. e.*, 'an equity,' not recognized or enforced by the common-law courts, the right had to be a right *in personam*, that is to say, a right in favor of one certain person, with its correlative duty or obligation imposed upon some other certain person."<sup>12</sup>

In view of the important consequences supposed by these and other writers and judges to flow from this "fundamental principle of" or "fundamental limitation upon" equity, it might be supposed that long ago the terms thus used so freely would have been sub-

<sup>8</sup>James Barr Ames, "Law and Morals," in Lectures on Legal History, 444. See also his remarks on page 76 of the same work.

<sup>9</sup>Langdell, Brief Survey of Equity Jurisdiction, 6.

<sup>10</sup>3 Maitland, Collected Papers, 350, note 1.

<sup>11</sup>Beale, Summary of Conflict of Laws, in Cases on Conflict of Laws, vol. III, 512.

<sup>12</sup>Professor Henry Schofield, 5 Ill. Law Rev., 19, 20.

jected to rigorous analysis and definition, but this does not seem to be the case. Apparently it is usually assumed that the terms are almost self-explanatory, or at least that they have a well-recognized meaning understood by all and so require only the briefest of explanations. Even a superficial examination of the books upon equity, however, will show not only that different writers give them different meanings, but that the same writer, sometimes within the limits of a single paragraph or even sentence, uses them first in one sense and then in another. That most of the disputes of this world turn on the meaning of words, is a saying credited to Cardinal Newman. It is therefore proposed in the present discussion to re-examine the subject anew, beginning with the definition of the terms used, in the belief that by so doing much light can be thrown upon the actual solution of problems which arise in courts of equity. As indicated by the passages quoted, the subject is of more than theoretical importance, in view of the use made of the "maxim" by judges in the actual decision of cases.

At the outset of our discussion we are confronted by the striking fact that these phrases—*in rem* and *in personam*—are used in the classification of several very different things. There seem to be at least four different uses which need to be distinguished: 1. These phrases are used in the classification of the so-called "primary" rights which legal and equitable actions are supposed to protect and enforce. The classification here is, of course, the well-known one of "rights *in rem*" and "rights *in personam*." 2. The next use has to do with the equally well-known classification of actions as "actions *in rem*" and "actions *in personam*." 3. A third use is in the classification of judgments and decrees as "*in rem*" or "*in personam*." 4. The fourth use refers to the procedure used by a court in the enforcement of its judgment or decree. Here the court is said to "act *in rem*" or "act *in personam*," as the case may be, the usual statement being that law does the former and equity the latter. A re-reading of the passages quoted at the opening of this discussion will show that many of the writers fail to differentiate clearly these different uses of these phrases, apparently assuming, for example that if a court acts "*in personam*," it must be enforcing a right "*in personam*." It seems necessary, therefore, if we are to make any progress in the solution of our problem, to discuss in order all four of these classifications, in order to see in what way they are related to each other.

*Rights.*

The most common classification of rights is that into rights *in rem* and rights *in personam*. Before we examine this classification we must notice that the word "right" itself is one of the most abused words in the legal vocabulary, being applied to a number of widely differing jural relations. This has been so recently and so exhaustively discussed by Professor Hohfeld in his valuable article upon Fundamental Legal Conceptions,<sup>11</sup> as well as earlier by Terry,<sup>12</sup> that no exhaustive treatment will be undertaken here. It will be sufficient for our present purposes to enumerate briefly the different meanings attached to the word and to indicate in which sense it is used in this discussion.

In the strict and proper sense of the word, "right" is used as the correlative of "duty," *i. e.* when we say that A has a certain right against B, we mean at the same time that the law regards B as under a correlative duty. For example, if A has a right that B shall not assault him, B, we say, is under a correlative duty to A not to assault him. Both statements mean, of course, in the last analysis that if B does (or in other cases fails to do) a certain act or certain acts, A can bring an action in the appropriate tribunal and obtain some kind of a judgment or decree against B.<sup>13</sup>

It would no doubt be extremely desirable if we could restrict the word right to this one sense, but usage is against us. We find ourselves talking of the right of self-defence, the right to use one's land or other property, etc. If we stop to analyze, we find that what is dominant in our minds is, that it is no wrong for one to defend himself, or to use his property in a particular manner. We are not looking at B's duties to A, but at the fact that A owes no duty to B. In the case of self-defence, A, who ordinarily owes B a duty to refrain from striking him, is under no duty, so long as he keeps within certain limits, to refrain from doing so. In the case of the so-called "right to use" property, it is part of A's ownership that he is under no duty to refrain from doing an indefinite number of things on the land. This kind of a right, it has been suggested, may be called a "permissive

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<sup>11</sup>23 Yale Law Journal, 16.

<sup>12</sup>H. T. Terry, *Leading Principles of Anglo-American Law*, §§113-129.

<sup>13</sup>Bingham, *The Nature of Legal Rights and Duties*, 12 Michigan Law Rev. 1. Of course if we wish to make our statement strictly accurate, we must note that mere threats to do acts, which if done would give rise to a cause of action, often give rise to an equitable cause of action for an injunction. But to make a threat is to do an act, so after all our statement is not incorrect.

right,"<sup>14</sup> or "privilege."<sup>15</sup> In what follows, the word "privilege" will be used to signify this kind of a "right." The correlative of "privilege" is of course "no-right,"<sup>16</sup> i. e. when B has "no-right" to have A refrain from an act, A has the "privilege" of doing that act.

Still other uses of the word "right" are to be found. It is sometimes said that one bound by a contractual obligation has, at least at law, a "right" to break it and pay damages.<sup>17</sup> If one bears in mind the meaning of "right" in the strict sense, as we have defined it above, this statement is obviously untrue. It is, however, true that usually (at least at common law) he has the power to break it, and he thereby becomes liable for damages for doing so.<sup>18</sup> In the case of so-called complete breach, the effect is to end the contractual obligation as such, and to substitute the "right of action" for damages. So when we speak of a "right" to a mechanic's lien, we are not using it in either of the first two meanings; there may be no personal duty on the owner of the land at all and we do not have in mind the idea of "privilege." What is meant is that the holder of the lien can, through the court, exert a "power" over the owner's interest in the land. The correlative of "power" may, following Professor Hohfeld's suggestion, be called "liability."

Confining our attention for the present to rights in the strict sense—for it is obviously these that Austin and others are classifying—let us examine the usual classification more closely. Austin's definitions are as follows:

"Rights *in rem* may be defined in the following manner: 'Rights residing in persons and availing against other persons *generally*.' . . . The following definitions will apply to personal rights (*i. e.* rights *in personam*): 'Rights residing in persons and answering to duties which are incumbent exclusively on persons specifically determinate.'"<sup>19</sup>

<sup>14</sup>Terry, *Leading Principles of Anglo-American Law*, §§ 113-129.

<sup>15</sup>Hohfeld, 23 *Yale Law Journal*, 32.

<sup>16</sup>Hohfeld, 23 *Yale Law Journal*, 32.

<sup>17</sup>O. W. Holmes, *The Common Law*, 301.

<sup>18</sup>In the case of an offer coupled with a promise to keep the offer open for a certain time, if this promise is either under seal or given for a consideration, it seems to be the prevailing view that the offer is irrevocable. *O'Brien v. Boland* (1896) 166 Mass. 481; McGovney, "Irrevocable Offers," 27 *Harvard Law Rev.* 644. If this be true, the contract to keep the offer open can not be broken so as to destroy the offer. Quite possibly an action could be brought because of the ineffectual attempt to revoke, on the analogy of anticipatory breach.

<sup>19</sup>Austin, *Jurisprudence* (5th ed.) 370.

Holland's definitions are:—

"A right is available either against a definite person or persons, or against all persons indefinitely. A servant, for instance, has a right to his wages for the work he has done, available against a definite individual, his master; while the owner of a garden, has a right to its exclusive enjoyment available against no one individual more than another, but against everybody."

"This distinction between rights has been expressed by calling a right of the definite kind a right *in personam*, of the indefinite kind a right *in rem*. And these terms, though not perfectly satisfactory, have obtained a currency which is of itself a recommendation, and moreover are perhaps as good as any substitutes which could be suggested for them. The former term indicates with tolerable perspicuity a right available '*in personam (certam)*', against a definite individual, while the latter implies that the right is capable of exercise over its object, '*in rem*', without reference to anyone person more than another. . . . If the terms '*in rem*' and '*in personam*' were to be discarded, we should prefer to speak of 'rights of determinate,' and 'rights of indeterminate incidence.'"<sup>20</sup>

It will be seen that these definitions do not in essence differ, and they seem to be the ones usually adopted.<sup>21</sup> It should be carefully noted in passing that according to these definitions a right would not cease to be a right *in rem* and become a right *in personam* merely because it was not available against every person in the jurisdiction. According to the common law, a person who is peaceably in possession of a chattel is, even though he be a wrong-doer, owner as against every stranger, although of course he is not the owner as against the one from whom he is wrongfully detaining the article.<sup>22</sup> We cannot, of course, describe his right against all the persons within the jurisdiction except the true owner as a right *in personam*, and it certainly does seem to answer to the definitions of a right *in rem* as given above. Holland does in one place say "everybody," but it seems to be an inadvertence on his part. In other words, so long as the right is available against an indeterminate number of persons, even though not against all in the jurisdiction, it is a right *in rem* within the

<sup>20</sup>Holland, Jurisprudence (10th ed.) 139-141.

<sup>21</sup>Markby, Elements of Law, § 164; Pollock, First Book of Jurisprudence, 81; Salmon, Jurisprudence (2d ed.) § 81; Terry, Anglo-American Law, §§ 129-130. It may very likely turn out, on analysis, that "right *in rem*" is only a shorthand expression for a congeries of actual and potential rights *in personam*. See Terry, *loc. cit.*; Bingham, 9 Columbia Law Rev. 17.

<sup>22</sup>Jeffries v. Great Western Ry. (1856) 5 E. & B. 802; "The Winkfield" [1902] P. 42; Ames, Lectures on Legal History, 190.

usual meaning of that phrase. This is often overlooked<sup>23</sup> and we shall have occasion to recur to this later in discussing the oft-quoted statement of Langdell that "if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice."<sup>24</sup>

It is obvious, as previously stated, that these definitions, since they presuppose duties as correlative to rights, do not apply to "privileges" or "powers."

Before leaving this part of our subject, it is worthy of notice that the late Professor Ames, at least at times, used the phrase "right *in rem*" in what seems to be a totally different sense. In his essay on "The Disseisin of Chattels"<sup>25</sup> and in other essays<sup>26</sup> he seems to mean by right *in rem* the right to recover a physical object or *res* from those into whose hands it may come, whoever they may be. Speaking of the rights of a dispossessed owner of a chattel, he says: "His right *in rem*, if analyzed, means a right to recover possession by recaaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows then that they were not transferable and such was the law."<sup>27</sup> His right *in rem*, at least as applied to chattels, seems to be a mere chose in action, inalienable at common law.<sup>28</sup> It need hardly be said that this is not the sense in which "right *in rem*" is used above, and it is believed it is not a common one. It must of course be reckoned with in discussing

<sup>23</sup>Hart, "The Place of Trust in Jurisprudence," 28 L. Q. R. 296. Even if we should deny the name "right *in rem*" to rights available against an indefinite number of persons, but not available against "everybody," it would not follow that they were "rights *in personam*," as Mr. Hart concludes. They would still not be rights available against definite persons. They would be neither *in rem* nor *in personam*. It seems more convenient to classify them as *in rem*.

<sup>24</sup>Langdell, 1 Harvard Law Rev. 60; Brief Survey of Equity Jurisdiction, 6.

<sup>25</sup>3 Harvard Law Rev. 23; Lectures on Legal History, 272.

<sup>26</sup>See the lecture on "Detinue" in Lectures on Legal History, 77.

<sup>27</sup>Lectures on Legal History, 184-185.

Apparently, according to Professor Ames's conception, a complete right *in rem* includes the ability to recover the physical *res* from any one into whose hands it comes. Anything short of this is only a "qualified right *in rem*," (Lectures on Legal History, 184), or else only a right *in personam* (*Idem*, 74-75).

<sup>28</sup>The flaw in the distinguished writer's logic, if there be one, seems to lie in overlooking the fact that, in modern law, after the disseisin the dispossessed owner has a true right *in rem*, available against people generally, that they shall refrain from dealing with the chattel in certain ways, giving rise to actions of trover or case, according to the circumstances. Such a right is of course transferable.

any statements Mr. Ames may make concerning the nature of equitable rights.

Professor Ames's use of the term suggests another point which deserves emphasis. It might be inferred from his argument,—though he does not draw the inference and probably would not have done so had his attention been called to it—that the owner of a chattel in early English law did not have a right *in rem*. At the time when replevin would not lie for trespassory takings, and detinue was still a purely contractual action, the disseisee of a chattel, if he did not recapture it on fresh pursuit, lost all interest in it.<sup>29</sup> If right *in rem* means merely the right to recover possession from every one into whose hands it may come, the disseisee had no right *in rem*, either before or after the disseisin. But if *in rem* means a "right of indeterminate incidence," the right of the owner of the chattel before the disseisin occurs was clearly a right *in rem*, for he could bring an action for damages against any one who wrongfully interfered with his possession of the chattel. People generally were under duties not to disturb his possession of the chattel except for some lawful purpose, and the fact that, by committing a breach of duty, some one of them could put an end to the right did not prevent this right against people generally from being a right *in rem* so long as it lasted. It could of course be violated without its being lost, as where some one injured the chattel without depriving the owner of his possession. The real difference between the ancient law and the modern law is that the owner's right *in rem* is less easily destroyed now than then, and so is more valuable: in both it is a right *in rem*.

#### *Actions and Judgments.*

Actions are also commonly classified as *in rem* and *in personam*.<sup>30</sup> Before we discuss the significance of these terms as applied to actions, it may perhaps be well to examine briefly the nature of what writers on jurisprudence have called "remedial rights." Wherever a right, in the strict sense of that term, is invaded, there arises, these writers tell us, a 'remedial right.'<sup>31</sup> Indeed, the so-called "right" violated is such only because of the fact that it is vindicated or sanctioned in this way. A remedial right which arises because a primary right has been violated (or,

<sup>29</sup>Ames, *Lectures on Legal History*, 178.

<sup>30</sup>Langdell, 1 Harvard Law Rev. 119; Brief Survey of Equity Jurisdiction, 27.

<sup>31</sup>Holland, *Jurisprudence* (10th ed.) Chap. XIII.

in some cases in equity, because there is a threat of violation), is necessarily always available against a particular person or number of definite persons. If the classification of rights into rights *in rem* and rights *in personam* has any application to remedial rights, they are obviously rights *in personam*. If however we examine these remedial rights more carefully, we may perhaps conclude, at least where the remedial right is to damages at common law (though perhaps not in all other cases), that they are not rights at all in the strict sense of the term. Indeed it seems difficult to maintain for a moment that there is any "right" to damages in the strict sense of right, *i. e.* with a corresponding duty to pay the damages. If there were, it would be violated by non-payment of damages and a new remedial right would arise to be again violated by non-payment, and so on, *ad infinitum*. The "right to damages" on analysis, appears to consist of (1) a privilege,<sup>32</sup> and (2) a power with the corresponding liability. There is a liability on the part of the defendant to have a judgment entered against him, but no duty to pay until the judgment is entered.<sup>33</sup> The plaintiff through the court has a power to subject the defendant to the imposition of a new obligation known as a debt of record, which is of course a new primary right with its corresponding duty.<sup>34</sup> This power, of course, is always over a definite person or number of definite persons and may be called a "power *in personam*."

It may now be noted that, so far as the character of this "remedial right" is concerned, it is not material whether the primary right violated be a right *in rem* or a right *in personam*; what results is a remedial right against, or, as I prefer to put it, a "power *in personam*" over, a definite person or number of persons. Whether the cause of action upon which a plaintiff relies be for breach of simple contract or for a tort of any kind, the offending party is subject to the same kind of personal liability, *viz.*, to have

<sup>32</sup>That is, plaintiff is under no duty to refrain from setting the machinery of the court in motion. Terry, Anglo-American Law, §§ 142-144.

<sup>33</sup>Terry, *loc. cit.* If there were a duty to pay unliquidated damages, it would seem that a tender of an amount, later found to be ample, would, while not extinguishing the cause of action, deprive plaintiff of costs. This was not the law. Tender of any amount by way of unliquidated damages had apparently no legal effects at common law. *Cilley v. Hawkins* (1868) 48 Ill. 308.

<sup>34</sup>Of course it must not be overlooked that though the defendant is under no duty to pay damages, the court is under a duty to give the plaintiff his judgment if he adopts the correct procedure. From this point of view, the plaintiff's cause of action includes a true right, but not as against the defendant. This right, of course, is enforced not by an action for damages, but by appellate or other appropriate proceedings (mandamus, etc.).

a judgment for damages entered against him, with all its attendant consequences.<sup>35</sup> We may therefore say that the principal object of every action for damages in a common law court is to enforce such a "power *in personam*" over, or such a personal liability of, the defendant. This is expressed by saying that the action is a personal action or action *in personam*.

This discussion gives us the clue to our classification of actions. The action *in personam* is so classified because the principal object of the action is to enforce a personal liability, and the resulting judgment is usually called a personal judgment or judgment *in personam*. If, then, we are to classify actions according to the object sought to be accomplished by them, we must now ask ourselves, what other object can an action have? Perhaps this question is best answered by the consideration of some concrete cases. Let us therefore examine a common law writ of partition, or its modern successor, the statutory action of partition which exists in many States. What is the object of such an action? This, of course, is best answered by noting what plaintiff asks for and receives. We may for our present purposes confine ourselves to the common law writ. Professor Langdell thus describes its operation:

"When common-law courts were in the habit of entertaining suits for the partition of land, the partition was made by the court itself without any act of the owners of the property whatever. The court first rendered judgment that partition be made (*quod partitio fiat*); whereupon a writ was issued to the sheriff, directing him to make a partition of the land pursuant to the judgment, and report the same to the court. When this had been done, the court rendered another and final judgment that the partition so made remain firm and stable forever (*firma et stabili in perpetuum teneatur*); and by force of this latter judgment each party acquired the exclusive title to the share allotted to himself, and ceased to have any title to the shares allotted to the others."<sup>36</sup>

If we examine this proceeding, we find that it differs from a common law action for damages in a very striking way. The plaintiff does not claim that defendant has violated any right in the strict sense, which plaintiff had against him, *i. e.*, he does not claim that defendant has been guilty of any breach of duty. He

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<sup>35</sup>Even if a judgment did not create a new primary right (debt of record), it would give the plaintiff the right to execution against either the person or the *general assets* of the defendant; and this is what we have in mind when we call the liability and the judgment *in personam* or personal.

<sup>36</sup>Langdell, Summary of Equity Pleading (2d ed.) 36, note.

does not seek therefore to enforce any personal liability of defendant's. He does not, in other words, seek to enforce a "power *in personam*" against defendant. He does ask to have the interest which the defendant has in a particular piece of property altered. In other words, he seeks to get at a particular *chose* or *res* that defendant has and to deprive defendant of it. Since the enforcement of a power (of course exercisable only through the court) over a specific *res* is the object of the action, the action may appropriately be called an action *in rem*; and this use of the phrase is often found.

We may say very properly that plaintiff has a "power *in rem*," *i. e.* a power over a particular *chose* or *res* which defendant has. This power can be exercised only through the court, so we have a resulting "action *in rem*." It must of course be noted that now *in rem* has a very different meaning from what it has as applied to rights. "Right *in rem*" means "right available against people generally"; "power *in rem*" means power over a particular *res* which the defendant has.

It must also be noted that a power *in rem* is usually, though not always, exerted against a definite person or number of persons, and so an action *in rem* (as here defined) usually has as defendants a definite person or number of persons, and they alone are bound by the judgment and proceedings under it. They are deprived of their specific property interests, which it was the principal object of the action to get at; persons not parties to the proceeding are not deprived of their interests in the same physical *res*. However, an action *in rem* may (as in the admiralty cases) bar "the whole world," but this is not an essential feature of actions *in rem* as here defined. Some writers apparently apply the name "action *in rem*" only to those in which the interests of "the whole world" in the *res* are adjudicated. For our purposes, this restriction does not seem to be a useful one.<sup>37</sup>

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<sup>37</sup>It is probably true that the admiralty use of the term, denying that any action is *in rem* unless the "whole world" are barred by the judgment from afterwards claiming any interest in the *res*, is the more common. See, for example, 3 Beale, Cases on the Conflict of Laws, 538. If we limit the term in this way, we have no adequate name by which to describe those actions which we have called *in rem*, but which affect only the interests of the particular defendants. They are not actions *in personam*, for they enforce no personal liability of the defendant. Apparently Professor Beale would call them actions "*quasi-in-rem*." (Cases on Conflict of Laws, vol. III, 513). The common usage has the advantage (if it be one) that it makes the use of *in rem* here comparable to that in the classification of rights. However, what we shall call a thing is not so important as to know what we do mean when we use a phrase, and the particular terminology used in this article is not insisted upon

It is of course common to speak of a "right to have partition made." It is now clear, however, that this "right" upon analysis turns out not to be a true right, but a privilege and a power,<sup>38</sup> and, unlike the remedial right which arises upon the violation of a primary right, we do not think of it as based upon any wrong committed by the defendant. There is therefore no "power *in personam*" with its correlative personal liability.

Other examples of actions of this kind—many of them statutory—readily suggest themselves: proceedings for the condemnation of property under the power of eminent domain; proceedings to enforce special tax assessments upon real property, and usually also for the enforcement of the general tax upon real property; proceedings to enforce mechanics' and other similar liens; proceedings to foreclose mortgages in "lien theory" States, etc., etc. It must be noted that often a plaintiff has his choice between enforcing a remedial right (power) *in personam* by an action *in personam*; and enforcing a right (power) *in rem* by an action *in rem*. Instead of foreclosing a mortgage and getting his money by exercising his power over the land, he may of course enforce the personal liability of the mortgagor on the debt. These two things must, of course, be kept distinct.<sup>39</sup> In a modern mortgage foreclosure proceeding with its sale of the land and deficiency decree we find the two things combined: the foreclosure by sale, an action *in rem*, is combined with the deficiency decree, an action *in personam*. This becomes obvious the moment we consider the case of a foreclosure against a purchaser of the "equity of redemption" who takes subject to the mortgage but does not assume the payment of the debt. No deficiency decree can be entered against him, for, as we say, "he is not personally liable." The

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except as being useful for the end we have in view—the discussion of the powers of courts of equity. The distinction between an action which seeks to charge the defendant personally and one which seeks merely to deprive him of a specific *res*, is for our purposes the fundamental one, and our classification is therefore based upon it.

It must be carefully noted that our classification is based upon the principal object sought to be accomplished by the action. It may well be that an action *in personam* has some incidental effects *in rem*; and vice versa. This is left for discussion later.

<sup>38</sup>That is, there is no duty to refrain from bringing the action, and by bringing it the plaintiff can (through the court) exercise a power over a particular *res* belonging to the defendant.

<sup>39</sup>This distinction appears clearly in the admiralty cases in the difference between the *libel in rem* and the *libel in personam*. The "right" to one may exist without the "right" to the other. *Thompson Navigation Co. v. Chicago* (1897) 79 Fed. 984; *Workman v. New York City* (1900) 179 U. S. 552.

sole "right," so far as he is concerned, is really a power over his interest in that particular piece of property.<sup>40</sup>

Returning for a moment to our partition at common law: As we have seen, the object of the action is to deprive the defendant of an interest in a particular *res*. We must now note that the judgment, irrespective of what is done under it, accomplishes this directly, *i. e.* the common law court has the power to produce directly the desired result. The judgment is therefore said to be *in rem*, meaning that a specific interest in property is being transferred or extinguished. The use here is to be compared, of course, with the use of the phrase in classifying actions and not with its use in classifying rights. It is to be noted that in very few common law actions does the judgment have this effect.

Our classification of actions, then, turns upon their principal object—the assertion against the defendant of a power *in personam* or of a power *in rem*; of a general personal liability or of a liability to lose a particular *res*. If the principal object of the action is the former, we call the action *in rem*; if the latter, it is *in personam*. It is interesting to note the application of this classification to cases of "service by publication." It is common today to provide for "constructive service" by publication of non-resident defendants who are not personally in the jurisdiction. This is held to be permissible when the action is *in rem*, in the sense in which we have here defined it, the judgment or the proceedings under it being also *in rem*. It is also held permissible when the action is normally one *in personam*, providing some property interest of the defendant is regarded as having a situs within the jurisdiction and proper steps are taken to attach this interest. If we examine the cases dealing with this question carefully, we shall, it is believed, find that all that is permitted is really an action *in rem* as here defined. The legislature has, by this legislation, in effect authorized the substitution of an action *in rem* (in our sense of those words) in place of the normal action *in personam*. That this is the correct statement of the result seems clear when we recall that no personal judgment can be entered against the non-resident defendant served only by publication, the only "right" being to deprive him of the particular interest in property which has been duly attached.<sup>41</sup>

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<sup>40</sup>The original strict foreclosure is not here in view. That will be discussed later.

<sup>41</sup>*Pennoyer v. Neff* (1877) 95 U. S. 714; *Woodruff v. Taylor* (1847) 20 Vt. 65; 3 Beale, Cases on Conflict of Laws, 513. Of course if the non-resident defendant appears generally in the action and thus submits

In the typical common law action *in rem*, the writ of partition, the judgment, we saw above, carries out the object of the action directly, *i. e.* the effect of the judgment is to alter the property interest of the defendant in the desired manner. The judgment is then said very properly to be itself *in rem*.<sup>42</sup> In other actions *in rem* this result is accomplished only by what is done under the judgment by officers of the court, as in the case of the foreclosure of a mortgage by sale, or the sale of land for taxes. Sooner or later, however, entirely without the coöperation of the defendant, the desired alteration in his property interest takes place because of the judicial proceedings. Suppose now the principal object of the action remains the same, but the court can bring about the desired result only by ordering the defendant to execute a deed or some other instrument: will the action be converted into one *in personam*? Would a proceeding for the condemnation of land under the power of eminent domain become an action *in personam* if the statutes provided that title should pass to the State only when defendant, under order of the court, executed a deed to the State? In other words: Is it a requirement of an action *in rem* that the judgment or the proceedings under it have a direct action *in rem*? Does an action cease to be *in rem* if, while its principal object remains the same, *viz.*, to deprive the defendant of a particular *res*, a decree must be made, ordering the defendant personally to do an act in order that the object be accomplished? The answer to this question can perhaps best be given later in connection with our main discussion of the powers of courts of equity.<sup>43</sup>

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to the jurisdiction of the court, personal judgment may be entered. The effect is to restore to the action its original character as *in personam*. It may at the same time, however, retain its aspect as an action *in rem*. If the non-resident defendant wishes, he may in most jurisdictions, though not in all, appear specially for the purpose of disputing the validity of the attachment proceedings, in which case the action continues as one purely *in rem*.

"Here also usage differs; often the term is limited to judgments which bar "all the world." 3 Beale, Cases on Conflict of Laws, 538. This of course denies that a judgment, the effect of which is merely to pass title to defendant's interest in a *res*, is *in rem*. If we say this, then to be consistent we must say that the law does not act *in rem* in the case of a sale on execution. See *infra*, under "Procedure."

"The Roman law use of *actio in rem* and *actio in personam* must be carefully distinguished both from the classification here adopted and from that of those whose use of the terms has been indicated above in note 37. "The terms *jus in rem* and *jus in personam* are derived from the Roman terms *actio in rem* and *actio in personam*. An *actio in rem* was an action for the recovery of *dominium*; one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An action *in personam* was one for the enforcement of

*Procedure In Personam and In Rem.*

We now come to that use of the phrases *in rem* and *in personam* most commonly in the minds of writers who are comparing law and equity. When it is said that the law acts *in rem* while equity acts only *in personam*, it seems that what is in the mind of the person making the statement is the difference between the methods used by the law courts and by the courts of equity in enforcing their judgments and decrees respectively.

If a judgment *in personam* is entered at law for damages for a tort or breach of contract, the most usual method of enforcing the judgment, if it be not paid, is to issue execution against the defendant's property, and enough is sold to satisfy the plaintiff's claim. By virtue of such a proceeding the title to the property thus sold passes to the execution purchaser, and the defendant is deprived of his interest in it. Consistently with our use of the phrase in classifying actions, we may call this "procedure *in rem*." The action and judgment however, are *in personam*, since the object of the action was, not to get at any specific *res* which defendant owned, but merely to enforce a personal liability, and so to obtain a personal judgment. Having pointed out this method of enforcing common law judgments, our writers now proceed to explain action *in personam* by discussing a bill for specific performance brought by vendee against vendor, in the case of a contract for sale of land. They point out that the chancellor, having ordered the defendant to convey to the plaintiff the title to the land in question, proceeds to punish him for contempt if he does not obey. Without a statute the chancellor cannot act *in rem* on the title so as to deprive defendant of it and vest it in the plaintiff. All this, of course, is elementary learning. Here, it is said, is the fundamental difference between law and equity.<sup>44</sup> In the making of this comparison, however, there is involved a confusion of thought. In speaking of the court of equity, reference is had both to the character of the decree and also to the method

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an obligation; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal right vested in him as against the defendant." (Salmond, Jurisprudence (2d ed.) 208). See also Gaius, IV, 2; Sohm, Institutes, Ledlie's trans., 185. It is worthy of note in this connection that Langdell seems to use the terms, in part at least, in the Roman Law sense. (Brief Survey of Equity Jurisdiction, 27). This makes replevin and detinue actions *in rem*. Whether the definition here given covers these will be discussed later, in connection with our main discussion of the powers of courts of equity.

"Ames, Lectures on Legal History, 76.

of enforcing it. The decree is *in personam*, and the method of enforcing it is also *in personam*.<sup>45</sup> In the case of the judgment at law, the reference is entirely to the method of enforcing it, for obviously in the case put the judgment is purely *in personam*. Legal judgment and equitable decree are alike *in personam*, in the sense that neither has the direct effect, independently of what is done under it, of depriving defendant of an interest in a piece of property. There is a difference in form, to be sure, in that the law court adjudges that plaintiff recover a certain sum to which it regards him to be entitled, while the chancellor orders defendant to do his duty,<sup>46</sup> and this emphasis on duty rather than right has doubtless had its influence upon the character of equitable doctrines.<sup>47</sup> The real difference, however, if there be any, lies in the character of the means used to enforce the judgment and decree respectively. The law court, say these writers, in enforcing its judgment, proceeds or acts *in rem*, while the chancellor in enforcing his decree proceeds only *in personam*.

Whether this difference in many cases really exists and is so fundamental as is commonly supposed, we must leave for later discussion. That there is a difference between acting *in rem* and acting *in personam*, where the judgment or decree is *in personam*, is clear. To levy on a man's property, sell it, pass title to it to a purchaser, and pay the proceeds to the plaintiff who holds the judgment *in personam*, is very obviously to do a fundamentally different thing from ordering the defendant to do an act and putting him in jail for contempt if he does not obey; and the phrases *in rem* and *in personam* probably express this as well as any others. It should be noted, however, that the phrase *in personam* now acquires a shade of meaning somewhat different from any we have thus far given it. It now means merely that, as a punishment for not doing something and for the purpose of persuading him to do it, the court deals directly with the physical person of the defendant, as distinguished from dealing with his property.

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<sup>45</sup>Note that *in personam* is used in somewhat different ways here. This is discussed below.

<sup>46</sup>Ames, *loc. cit.* Does a court act *in rem* in an action of detinue? Professor Ames says so. If so, either *in rem* must mean, not passing title to property, but dealing with the physical object, or else the result of the proceedings in detinue is to pass title to the physical *res*. In either event, the truth of many of Mr. Ames's statements about equity are open to challenge. In Part II of this article this will be fully discussed.

<sup>47</sup>Ames, "Law and Morals," in Lectures on Legal History, 444.

We have now completed, so far as is necessary for our purposes, our classification of rights, of actions, of judgments and decrees, and of procedure to enforce judgments and decrees. It remains to apply this classification to equitable rights, actions, decrees and procedure. Before doing so, some interesting results of our analysis may be briefly pointed out.

1. Actions *in personam*, which, of course, result in judgments *in personam*, are used to enforce<sup>48</sup> rights *in rem* as well as rights *in personam*. In an action of trespass *quare clausum*, the primary right is *in rem*, but the action is obviously *in personam*, and so of course is the judgment. There is therefore no necessary connection between the character of the primary right and the character of the action and judgment which enforces it.<sup>49</sup>

2. Procedure *in personam* may be used to enforce either a right *in rem* or a right *in personam*. When for example, the chancellor commits B for contempt, he having violated an injunction restraining him from trespassing on A's land, the right thus enforced is, of course, A's right *in rem*; and the same is true wherever equity protects property rights. The procedure, however, is *in personam*, *i. e.* the chancellor will commit B for contempt if he violates the injunction.

3. Procedure *in rem* may be used to enforce either a right *in rem* or a right *in personam*. The common law procedure under a judgment for a trespass to land (violation of right *in rem*) and under one for breach of contract (violation of right *in personam*) is in both cases *in rem* if execution is had against defendant's property. There is therefore no necessary connection between the character of the primary right and that of the procedure to enforce the judgment which grew out of the violation of the right. A re-reading of the passages quoted at the opening of this article will show a strange failure on the part of some of those quoted to observe these facts.

4. Either procedure *in personam* or procedure *in rem* may be used to enforce a judgment *in personam*. Such a judgment is based upon a personal liability, and is the result of an action *in personam*.

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<sup>48</sup>Enforce, of course, does not mean *specifically* enforce.

<sup>49</sup>This is due to the fact, previously suggested, that right *in rem* is a name for a large number of rights *in personam*, actual or potential. A violation of a right *in rem* is always a violation of a definite one of these rights *in personam*.

The procedure to enforce it may consist (as in common law execution) of "acting *in rem*" on defendant's property, or (as in attachment for contempt in equity) of "acting *in personam*" by imprisoning the defendant. In other words, we think of judgment or decree as *in personam* if under it we can either get at the defendant's person or at his general assets without regard to any specific piece of property. A judgment is *in rem* only when by virtue of it we get at a specific property interest which the defendant has.<sup>50</sup>

(TO BE CONCLUDED.)

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<sup>50</sup>To make our discussion complete, we must of course under our definition of *res* include matrimonial status. A divorce action is of course *in rem* in our sense of the phrase.